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**IN THE
COURT OF APPEALS OF INDIANA**

LELAND WALL,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 49A02-0601-CR-30

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Jane Magnus-Stinson, Judge
Cause No. 49G06-0507-FB-6137

September 8, 2006

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Leland Wall (Wall), appeals his conviction of criminal deviate conduct, as a Class B felony, Ind. Code § 35-42-4-2, and sexual battery, as a Class D felony, I.C. § 35-42-4-8.

We affirm.

ISSUES

Wall raises two issues for review, which we restate as:

- (1) Whether the trial court improperly admitted certain statements that were hearsay; and
- (2) Whether the trial court erred when it refused to admit evidence of Wall's erectile dysfunction.

FACTS AND PROCEDURAL HISTORY

In March of 1994, Wall married Lucretia, mother of A.H. A.H. was born February 11, 1985. Over the Thanksgiving holiday in 2004, while on leave from the Army, A.H. told Lucretia that Wall had sexually abused her when she was in high school. Specifically, A.H. stated that on several occasions Wall came into her bedroom and asked her to pull up her shirt and pull down her pajama bottoms. Wall threatened to rape her if she refused his requests. Wall would then touch A.H.'s breasts, rub her genitals, penetrate her vagina with his fingers, and masturbate to ejaculation in front of her. Such instances of abuse also occurred in Wall's home office. On one occasion, after picking A.H. up from school to take her to an orthodontist appointment, Wall took her home and

forced her to watch a pornographic movie while he masturbated to ejaculation. After he ejaculated, he forced A.H. to put her mouth around his still-erect penis.

Additionally, Wall sometimes sat on the toilet in the restroom and watched A.H. shower. Once, when A.H. was showering, Wall entered the shower, touched her breasts and genitals, and digitally penetrated her vagina. Afterwards, A.H. went to her bedroom, laid on her floor, and cried. A.H.'s brother, J.L., then knocked on her bedroom door and entered to find A.H. crying. When J.L. asked why she was so upset, A.H. told him that Wall had just sexually abused her. However, when Lucretia later approached A.H., A.H. denied the accusation out of fear for Wall's reaction. A.H. did not mention the abuse by Wall to any family member again until Thanksgiving of 2004.

On January 13, 2005, the State filed an Information charging Wall with Counts I and II, sexual misconduct with a minor, as Class B felonies, I.C. § 35-42-4-9; Count III, criminal deviate conduct, as a Class B felony, I.C. § 35-42-4-2; and Count IV, sexual battery, as a Class D felony, I.C. § 35-42-4-8. On October 17-18, 2005, a jury trial was held. At the close of the State's evidence, Wall moved for a directed verdict as to Counts I and II, which the trial court granted. The jury then convicted Wall of Counts III and IV, criminal deviate conduct and sexual battery.

Wall now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. Lucretia's Testimony

Wall first argues that the trial court erred when it allowed the State to admit testimony by Lucretia that A.H. told her brother, J.L., that Wall was sexually abusing her. Specifically, Wall objects to Lucretia's testimony because it is double hearsay.

Hearsay, a statement made out of court that is offered into evidence to prove the truth of the fact or facts asserted in the statement itself, is not admissible at trial unless it fits within some exception to the hearsay rule. Ind. R. Evid. 801(c); *Simmons v. State*, 760 N.E.2d 1154, 1159 (Ind. Ct. App. 2002). Double hearsay is known as hearsay included within hearsay, or "multiple hearsay." *City of Indianapolis v. Taylor*, 707 N.E.2d 1047, 1055 (Ind. Ct. App. 1999), *trans. denied*. In the present case, the contested portion of Lucretia's testimony appears to constitute double hearsay at first glance, as A.H. made the statements to J.L., J.L. relayed the statements to Lucretia, and Lucretia then repeated a portion of the statements at trial.

However, upon closer review, the record reveals numerous objections by Wall during the State's inquiry of Lucretia as to her conversation with J.L., and the trial court's eventual striking of the statement from the record. Specifically, the following colloquy took place at trial between Lucretia, the State, Defense Counsel, and the trial court:

[THE STATE]: Okay. I'd like to recall other incidents. An evening where your son[, J.L.,] you found very upset?

[LUCRETIA]: Yeah.

[THE STATE]: Can you tell the jury about that evening?

[LUCRETIA]: Apparently [J.L.] had gotten in trouble [with Wall] . . .

* * *

[LUCRETIA]: And anyway, [J.L.] started getting upset . . . he started telling me that he couldn't tell me anything.

[DEFENSE COUNSEL]: Judge, objection. Hearsay.

[TRIAL COURT]: Response?

[THE STATE]: . . . this is not going to the truth of the matter asserted. It's just going to the discussion that was had in the bedroom.

* * *

[THE STATE]: It goes to the fact that [A.H.] stated when she was on the stand that there was a discussion that evening where [Lucretia] and [J.L.] were present. I'm just trying to flesh out whether or not that really occurred.

[TRIAL COURT]: The objection is overruled. However, what she says, ladies and gentlemen, is not being admitted to prove it's true. It's being admitted to prove the fact of the conversation according to the State . . . So you [cannot] accept as true anything that the witness says; just the fact of the conversation. . . .

* * *

[THE STATE]: So [J.L.] wouldn't tell you what was going on?

[LUCRETIA]: He wouldn't tell me at first. And eventually he told me that A.H. told him something and he promised her that he wouldn't say anything.

* * *

[LUCRETIA]: Apparently [A.H.] had told [J.L.] that [Wall] has –

[DEFENSE COUNSEL]: Judge, I'm objecting again. It's hearsay.

[TRIAL COURT]: Well, now it's double hearsay.

* * *

[THE STATE]: I'll rephrase the question, Your Honor. I'll withdraw it. What did [J.L.] tell you?

[LUCRETIA]: [J.L.] said that –

[DEFENSE COUNSEL]: I’m still objecting that it’s hearsay, again.

* * *

[TRIAL COURT]: Okay. With the caveat that she may not say anything that [J.L.] said [A.H.] said because that’s double hearsay . . . I’ll overrule the objection, ladies and gentlemen. But, again, what she says isn’t being offered to prove it’s true. You may not accept it as such. Simply to prove the fact of the conversation. . . .

* * *

[LUCRETIA]: That [A.H.] told him that [Wall] has –

[DEFENSE COUNSEL]: And Judge, I’m sorry. This is the subject of the objection; that it’s a double hearsay. And she can’t testify to this.

[TRIAL COURT]: The answer is stricken.

(Transcript pp. 111-15).

Thus, despite the trial court’s two admonitions to the jury that the contents of the conversation could not be accepted as true and its striking of Lucretia’s incomplete statement about what A.H. told J.L., Wall still argues that Lucretia’s testimony was used to bolster the truthfulness of A.H.’s testimony. Under Ind. Evid. R. 704(b), testimony used to vouch, or bolster, the truthfulness of another’s testimony is improper. *See Weis v. State*, 825 N.E.2d 896, 901 (Ind. Ct. App. 2005). Yet, in light of the testimony’s perpetual interruption through objections, which resulted in no complete statement relating to the contents of the conversation between A.H. and J.L., we conclude that there was no improper hearsay admitted. Furthermore, of the fragments of statements that were put before the jury, we presume that the jurors followed the trial court’s

admonishments that none of the statements should be considered for their truthfulness. *See Francis v. State*, 758 N.E.2d 528, 532 (Ind. 2001). For these reasons, along with the trial court's striking of Lucretia's last statement, we find that this argument by Wall fails. *See id.*

II. *Exclusion of Wall's Medical Records*

Next, Wall asserts that the trial court erred when it refused to admit medical records evidencing that he suffered from erectile dysfunction during the period he allegedly abused A.H. Specifically, Wall contends that the medical records would have rebutted testimony by Lucretia that she and Wall did not engage in sexual relations during A.H.'s last two years of high school, a statement from which the jury could infer that Wall was fulfilling his sexual needs through abusing A.H.

Our standard of review in this area is well-settled. The decision to admit or exclude evidence is within the sound discretion of the trial court and is afforded a great deal of deference on appeal. *Dorsey v. State*, 802 N.E.2d 991, 993 (Ind. Ct. App. 2004). The admission or exclusion of evidence will not generally be reversed on appeal absent a manifest abuse of discretion that results in a denial of a fair trial. *Id.* An abuse of discretion occurs where the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court. *Id.* In determining the admissibility of evidence, we will only consider the evidence in favor of the trial court's ruling and unrefuted evidence in the defendant's favor. *Howard v. State*, 816 N.E.2d 948, 957 (Ind. Ct. App. 2004), *reh'g denied*.

At trial, the State questioned Lucretia about her marriage to Wall, to which Wall's counsel objected on relevancy grounds. After a discussion between the parties' counsel and the trial court outside the presence of the jury, the trial court sustained the objection to the question as phrased, but went on to allow Lucretia to testify about her sexual relations with Wall during A.H.'s high school years. In particular, Lucretia testified that she and Wall were sexually active during A.H.'s first two years of high school, but were not sexually active during A.H.'s last two years of high school. Prior to the introduction of the testimony, Wall's counsel reiterated that any such testimony was objected to because the testimony was not relevant and highly prejudicial.

After the testimony's admission, to rebut the State's evidence, Wall proffered the admission of certified medical records under Ind. Evidence Rule 902(9) to show he suffered from erectile dysfunction during A.H.'s last two years of high school. The State objected to admission of the medical records, and the trial court sustained the objection, stating in pertinent part:

I'll sustain the State's objection to the admission of the records for two reasons. One is [that] they are certified medical records not subject to cross[-]examination. And I think the State is correct in pointing out degrees [of erectile dysfunction,] which would necessitate medical discovery. Second of all, it doesn't preclude the defense from calling the defendant to testify about his erectile dysfunction, which is a choice that you can make. But [Ind. Evid. R.] 902(9) requires advance[] notice when you're going to do medical records for the precise reason that the State should be allowed to conduct discovery on those issues.

(Tr. p. 179).

In our review, we conclude that the trial court did not err when it refused to admit Wall's medical records. As the trial court noted, Ind. Evid. R. 902(9) requires that

certified records be made available to the adverse party for inspection “sufficiently in advance of its offer in evidence to provide the adverse party with a fair opportunity to challenge it.” Here, Wall did not proffer the evidence until after his trial had already begun and after the State had presented its case. Although we agree with Wall that the medical records may have indirectly rebutted Lucretia’s testimony that she ceased having sexual relations with Wall during the period of time Wall abused A.H., rebuttal evidence must still conform to the Indiana Rules of Evidence. Furthermore, regardless of Lucretia’s testimony, Wall could have made the medical records available during discovery and proffered them at trial to generally rebut A.H.’s allegations. However, he did not do so. Moreover, admission of the medical records would have allowed Wall to place his medical history into evidence without permitting the information therein to be cross-examined. *See Schmidt v. State*, 816 N.E.2d 925, 941 (Ind. Ct. App. 2004). Thus, due to Wall’s failure to adhere to the requirements of admitting certified records and the records’ incapability of cross-examination, we conclude that the trial court properly excluded this evidence.

CONCLUSION

Based on the foregoing, we conclude that no improper hearsay was admitted at trial, and that the trial court properly excluded Wall’s medical records.

Affirmed.

BAILEY, J., and MAY, J., concur.